

UNITED STATES COURT OF APPEALS  
TENTH CIRCUIT

**APR 1 1997**

**PATRICK FISHER**  
Clerk

STEVEN RICHARD NEILSON,

Plaintiff-Appellee,  
vs.

ELHAM NEILSON,

Defendant-Appellant.

No. 96-4013  
(D.C. No. 95-CV-30)  
(D. Utah)

ORDER

Before BRORBY, EBEL, and KELLY, Circuit Judges.

Based upon a settlement agreement between the parties, the district court on December 21, 1995 entered an order dismissing Plaintiff Steven Neilson's complaint and permanently enjoining Defendant Elham Neilson from intercepting and recording various telephone conversations. On January 16, 1996, Defendant filed a motion to be relieved from the settlement judgment. See Fed. R. Civ. P. 60(b). The next day, she filed a notice of appeal. On February 13, 1996, the district court dismissed the motion without a ruling for lack of jurisdiction, reasoning that the notice of appeal divested it of jurisdiction. On February 27, 1996, Defendant filed an opening brief in this court.

Plaintiff has filed a motion to dismiss the appeal, contending that Defendant's

grounds for relief will require an evidentiary hearing and seeking a remand to the district court. We construe Defendant's opening brief as the functional equivalent of a notice of appeal from the dismissal of the Rule 60(b) motion. See Smith v. Barry, 502 U.S. 244, 248-49 (1992).

Under Garcia v. Regents of Univ. of Cal., 737 F.2d 889, 890 (10th Cir. 1984), we will deny the motion to dismiss without prejudice. The district court should consider Plaintiff's motion for relief and, if it is inclined to grant the motion, it should so certify to this court and we will dismiss the appeal. If it is not so inclined, it can deny the motion without a remand from us and any appeal from that order would be consolidated with this case. Id. See also Aldrich Enter. v. United States, 938 F.2d 1134, 1143 (10th Cir. 1991). The district court should act within sixty days from the date of this order.

Entered for the Court

Paul J. Kelly, Jr.  
Circuit Judge